



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL CASE NO.23 OF 2011**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**RICHARD KIPROTICH YEGON.....ACCUSED**

**R U L I N G**

1. **Kiprotich Yegon** (the accused) is charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.
2. The particulars are that the accused on the 7<sup>th</sup> day of May 2011 at about 9.00pm at Mindililwet village, in Kericho District within the Rift Valley Province, murdered **DAVID KIPRONOG YEGON**.
3. The accused pleaded not guilty to the charge and the case proceeded to hearing with the prosecution calling a total of seven (7) witnesses, to support its case.
4. It was the submissions of Mr. Koskei for the accused that there was no direct nor sufficient circumstantial evidence that was adduced by the prosecution. He relied on the case of **Sawe V. R C.A (Nrb) CRA No.2 of 2002** and asked the Court to find that no *prima facie* case had been established, against the accused.
5. It was the response by the State that they had established a *prima facie* case against the accused.
6. The postmortem report which was produced by PW4 with the consent of Mr. Koskei showed the cause of death as Cardiorespiratory arrest secondary to Massive haemothorax due to chest injury most likely blunt trauma to chest.  
  
After consenting to its production Mr. Koskei cannot turn around to say PW4 was not a qualified pathologist and further that the cause of death is unknown.
7. A perusal of the evidence adduced shows that there was no direct evidence linking the accused to the offence. The prosecution indeed relied on circumstantial evidence to build up its case.
8. PW1 & PW2 are brothers of the deceased. They did not witness the incident. They found the deceased already injured and only assisted.
9. PW6 No.232646 IP. Francis Waithaka produced a stick (EXB 2) allegedly taken to the police station by the deceased's brother Phillip who testified as PW1. Apparently, PW1 never mentioned

anything about such recovery of a stick. Since the stick was not identified by Phillip (PW1) or any other witness who may have recovered it, its production has not added any value to the evidence.

10. The only evidence which tended to connect the accused to this offence is that of his wife (PW3). She did not witness the incident and did not see the accused that night. Her evidence was that the deceased arrived home on 7<sup>th</sup> May, 2011 at 9.00pm and informed her that he had fought with Richard Moso who is the deceased's brother.

11. Soon thereafter they heard stones being thrown on the roof of their house. The deceased went outside to establish what was happening. She did not see where he went to. He later returned and informed her that **Richard had hit him on the head**. She even washed his head before they slept.

12. Later at night the deceased developed breathing problems and she left to call her mother in law. When they came back they started screaming for help. Neighbours carried the deceased to the road from where a motor vehicle picked him and took him to hospital accompanied by PW1 & another.

13. She told the Court that Richard the deceased was talking about was the accused, person.

14. PW1 who is a brother to the deceased said he was called by his younger brother Weldon (PW2) and informed that the deceased had been injured and needed to be taken to Hospital. He was not given any information on who had injured him.

15. Weldon (PW2) in his testimony said he responded to screams from the deceased's home. He found PW3 who was screaming saying it was Richard who had beaten the deceased. PW2 was categorical that he did not inquire from PW3 which Richard had injured the deceased.

16. PW3 told the court that she knew the accused as Richard Moso who is an elder brother of the deceased. However, when PW1 and PW2 testified the only person they referred to as their brother is the deceased. They have not indicated anywhere that the accused is their brother or that they know him.

17. In cross-examination by Mr. Koskei for the accused PW6 (Investigating Officer) said he did not know of any brother of the deceased by the name of Richard Moso. The accused in this case is **Richard Kiprotich Yegon**. Who then is Richard Moso whom PW3 was referring to?

18. The prosecution relied heavily on this evidence of PW3 which was a dying declaration to found its case. How then is a dying declaration to be handled? In the case of **Achira V. R (2003) KLR 707** the Court of Appeal stated thus;

1. *The Court should approach the evidence of a dying declaration with necessary circumspection.*
2. *It is generally speaking unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination unless there is satisfactory corroboration.*
3. *The trial judge erred in finding that the uncorroborated accomplice evidence could corroborate the deceased's dying declaration.*

Further in **Masaku Vs. R (2008) KLR Azangalala & Njagi JJ** (As they then were) held;

4. *The deceased suffered a grave head fracture and was bleeding in the brain, the nerve centre of all operations of the body. The possibility of confusion or less than perfect recollection was real. It would not be safe to base a conviction solely on*

*the dying declaration. The trial Magistrate did not appreciate the inherent weakness in the dying declarations and should have exercised extreme caution when receiving the same.*

19. A dying declaration cannot therefore be solely relied on to found a conviction. It must be corroborated. A careful scrutiny of the evidence on record reveals the following;

- The stick (EXB2) produced by PW6 was not identified by any witness let alone PW1 who allegedly took it to the police station. The said PW1 did not make mention of it in his evidence.

- The stick (EXB2) was not taken for any analysis. There was no mention of blood stains on it.

- PW3 said the deceased had an injury on the head which she washed before they retired to bed.

- The postmortem report (EXB1) showed the cause of death as cardiorespiratory arrest secondary to massive haemothorax due to chest injury most likely blunt trauma to the chest. In fact the report further states **“NO EVIDENCE OF HEAD INJURY EXTERNALLY.”**

- Whereas PW3 states that the deceased told her he had fought and was injured by Richard Moso no evidence has been led to show who Richard Moso is.

- She further said the accused was Richard Moso and he had no other name and was her brother in law.

- The evidence shows otherwise. The accused is Richard Kiprotich Yegon. Secondly, PW1 and PW2 who are the deceased's brothers and brothers in law of PW3 did not anywhere identify themselves with the accused.

- Thirdly, PW2 who arrived at the scene said PW3 only told him of a Richard who had injured the deceased. The Richard was not identified by a second name. Further PW3 did not tell PW1 who had injured the deceased.

- Fourthly, the mother in law of PW3 did not testify to indicate what PW3 had told her about the injuries suffered by the deceased.

20. All this evidence does not in any way support and/or corroborate the dying declaration. In the circumstances, if the accused person elected to remain silent in his defence the evidence before the court would be too weak to sustain a conviction.

I therefore find that the Prosecution has failed to establish a *prima facie* case against the accused person to make me place him on his defence. The accused is hereby acquitted under **Section 306 (2) of the Criminal Procedure Code.**

He will be released unless otherwise lawfully held under a separate warrant.

**Dated, signed and delivered in open court this 11th day of March, 2015**

**H.I.ONG'UDI**

**JUDGE**

**In the presence of**

M/s Kivali for State

Mr. Koskei for accused – present

Accused- present in person

Langat- court assistant

Interpretation- English/Kipsigis